

120 FERC 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Wisconsin Public Service Corporation

Docket Nos. ER05-1089-001
AC05-54-001
EL05-136-001
ER06-1027-000

Wisconsin Public Service Corporation

Docket No. AC06-16-000
(Not Consolidated)

ORDER ON SETTLEMENT AGREEMENTS

(Issued August 21, 2007)

1. On November 9, 2006, Wisconsin Public Service Corporation (WPSC) submitted a Settlement Agreement (Settlement) between itself and the Algoma Group,¹ and an Offer of Settlement (Offer)² between itself and other parties who have not participated in the litigation or settlement negotiations in this proceeding (Offerees).³ The Settlement and Offer are intended to resolve issues pertaining to WPSC's sale of its ownership

¹ The Algoma Group consists of: Alger Delta Cooperative Electric Association; Village of Stratford Water and Electric Utility; Washington Island Electric Cooperative; Manitowoc Public Utilities; the City of Marshfield, Wisconsin; Badger Power Marketing Authority; and the City of Wisconsin Rapids, Wisconsin.

² The Settlement and Offer will be referred to collectively as the "agreements."

³ The Offerees consist of: the Village of Daggett, Michigan; the City of Stephenson, Michigan; Upper Peninsula Power Company; Oconto Electric Cooperative; and Consolidated Water Power Company.

interest in the Kewaunee Nuclear Power Plant (Kewaunee Plant),⁴ and more specifically, refunds owed to customers due to the impact of the sale on WPSC's cost-based wholesale rates. The Commission will conditionally approve the Settlement and Offer, as modified.

Background

2. On March 11, 2004, the Commission issued an order approving the sale by WPSC and Wisconsin Power & Light (WP&L) of their respective ownership shares in the Kewaunee Plant to Dominion Energy Kewaunee, Inc. (DEK).⁵ In their application, WPSC and WP&L proposed transferring the qualified decommissioning trust to DEK for decommissioning, and refunding those monies to their customers. The Commission directed the applicants to submit appropriate filings under section 205 of the Federal Power Act (FPA)⁶ to detail and implement their respective refund plans.⁷

3. During this time, however, the Nuclear Regulatory Commission (NRC) inspected the Kewaunee Plant and determined that the auxiliary feedwater pump system would be inoperable if other systems failed. Accordingly, the plant was shut down on February 20, 2005 to implement modifications to the pump system. The unplanned outage would cause DEK to incur material costs after the closing of the sale, likely resulting in a loss to DEK. Also as a result of the outage, WPSC experienced significant additional costs.

4. Thereafter, WPSC made two filings. First, on May 5, 2005, WPSC submitted an accounting letter, in Docket No. AC05-54-000, providing notice to the Commission of its intent to use deferred accounting for certain incremental costs incurred in connection with the unplanned outage at the Kewaunee Plant. WPSC stated that it planned to use Account 182.3 (Other Regulatory Assets) to record the outage costs incurred between February 20, 2005, and the date it completed modifications to the plant. WPSC estimated that it would incur approximately \$35 to \$45 million in outage costs, largely consisting of replacement power. WPSC also indicated that it intended to apply carrying charges to the outage costs at the pre-tax weighted cost of capital.

5. Second, on June 7, 2005, WPSC filed its refund plan pursuant to section 205 of the FPA, concerning the impact of its sale of the plant on its cost-based wholesale rates. WPSC explained that it was proposing to create a net regulatory liability consisting of the refunds to customers from the value of the non-qualified decommissioning trust (NQDT)

⁴ *The Kewaunee Plant is located in Kewaunee County, Wisconsin.*

⁵ *Dominion Energy Kewaunee, Inc.*, 106 FERC ¶ 62,191 (2004).

⁶ 16 U.S.C. § 824d (2000).

⁷ *Dominion Energy Kewaunee, Inc.*, 106 FERC ¶ 62,191 (2004).

offset by: (1) the likely net loss on the sale of the Kewaunee Plant; and (2) the Kewaunee Plant-related outage costs. WPSC proposed to amortize the regulatory liability over five years from the effective date as a credit to wholesale customer bills.

6. On August 4, 2005, the Commission issued an order accepting and suspending WPSC's proposed refund plan, instituting an investigation, establishing a refund effective date and evidentiary hearing, establishing settlement judge procedures, and consolidating dockets.⁸ Finding that the proposal had not been shown to be just and reasonable, the Commission suspended the filing, making it effective January 1, 2006, subject to refund. The Commission postponed commencement of an evidentiary hearing and instead established settlement judge proceedings.⁹

7. On May 19, 2006, in Docket No. ER06-1027-000, WPSC filed an amendment to its refund plan to change its refund methodology from a distribution based on forward-looking allocations to an approach based on historical NQDT contributions. The Commission issued an order on June 30, 2006, accepting the amendment for filing to become effective, subject to refund, on August 1, 2006, and consolidating the proceeding with the instant proceeding for hearing and settlement judge procedures.¹⁰

8. Settlement negotiations resulted in the instant settlement package. The settlement package includes the Offer to customers who did not participate in litigation or settlement negotiations but made NQDT payments under cost-based rates.

Settlement and Offer

9. Under the Settlement's main provisions, WPSC will make a lump-sum payment of \$7.1 million to the Algoma Group to resolve the members' contributions to the NQDT during the period they received service from WPSC. In addition, members of the Algoma group will make two lump-sum payments, totaling \$158,450, to WPSC, to resolve issues related to contingent losses, non-contingent losses otherwise allocable to such entities and the 2005 Kewaunee Plant outage.

10. Under the Offer, WPSC will pay the five Offerees monies to resolve the NQDT allocation payment issue. At the same time, the five Offerees will pay WPSC monies to resolve issues regarding contingent and non-contingent losses, as well as fuel and

⁸ *Wisconsin Public Service Corporation*, 112 FERC ¶ 61,165 (2005).

⁹ *Id.* at P 21.

¹⁰ *Wisconsin Public Service Corporation*, 115 FERC ¶ 61,393 (2006).

purchased power and operation and maintenance payments related to the 2005 Kewaunee Plant outage.¹¹

Comments and Reply Comments

11. On November 29, 2006, Commission Trial Staff (Staff) filed comments regarding the Settlement and Offer. While generally not opposed to the agreements,¹² Staff takes issue with two provisions appearing in both documents, further detailed below. On December 11, 2006, WPSC and the Algoma Group jointly filed reply comments.¹³ On December 15, 2006, the administrative law judge certified the settlement as uncontested and concluded that the Commission could approve the Settlement and Offer without modification.

Discussion

12. We find that the Settlement and Offer, as modified below, are reasonable and in the public interest. We partly agree with Staff that certain changes to the agreements are required. The modifications and Staff's concerns are discussed below.

Ditem Provisions

Comments and Reply Comments

13. Staff's comments express concern with Article V, section 5.1 of the Settlement and Article II, section 3.1 of the Offer, both titled "Other Rate Provisions" (herein referred to as "Ditem provisions"). In these Ditem provisions, WPSC and certain members of the Algoma Group (in the Settlement) and certain members of the Offerees (in the Offer) agree on terms designed to handle the formula rate treatment of deferral and amortizations, identified as "Ditems." Footnote 3 to the Settlement Agreement defines "Ditem" as "a cost or a credit which is treated as a deferred asset as currently recorded in Account 182 or a deferred liability as currently recorded in Account 254 respectively." Under the agreed-to approach, "a wholesale Ditem will be deferred and amortized consistent with the PSCW [Public Service Commission of Wisconsin]

¹¹ The varying payment amounts are set forth in a table in Article II of the Offer.

¹² Staff states that the payments provided for in the Settlement and Offer appear to be reasonable. Staff also states that WPSC's extension of the offer is particularly proper, in that the Offer was discussed in advance with each Offeree and the Offerees have indicated that they do not oppose the Offer.

¹³ WPSC and the Algoma Group will be referred to collectively as the "Joint Parties."

treatment of the retail Ditem.” The Settlement Agreement further states that “[t]he deferral and amortization will be effective for wholesale as and when the PSCW authorizes deferral and amortization of the retail Ditem to become effective.” Moreover, it states that the customers “agree to not dispute the act of deferral or the length of the amortization period of a Ditem either at the PSCW or at the FERC.”

14. According to Staff, the Ditem provisions could restrict the Commission’s review of future wholesale rate deferrals by subordinating the Commission’s regulation to that of the state commissions. Staff further states that the provisions could be inconsistent with the Commission’s formula rate policy, which Staff describes as requiring a specific filing with the Commission followed by agency approval for the recovery of a specific regulatory asset through rates, particularly formula rates.¹⁴ Staff suggests that the Commission direct modifications to the Settlement and Offer, such that the proposed treatment of deferrals and amortizations provided for in those agreements be applied only to deferrals and amortizations of costs that are being paid out in the instant case, *i.e.*, the NQDT Allocation Payment, the Contingent and Non-Contingent Loss Payments, and the Fuel and Purchased Power and Operation and Maintenance Payments related to the 2005 Kewaunee Plant outage.

15. In reply, the Joint Parties state that the agreements do not affect Commission review of future deferrals. They explain that the Settlement adds the Ditem provisions to the Company’s W-1A and W-2A tariffs and its Rate Schedule 51. According to the Joint Parties, these Ditem provisions merely require that WPSC offer its customers the option to treat wholesale Ditems consistent with their retail treatment. In exchange for this commitment, the Joint Parties state that any wholesale versus retail timing difference affecting the recovery of future Ditems will not trigger the rate ceiling procedures contained in the wholesale tariff.

16. The Joint Parties state that this exchange of considerations does not bind the Commission. That is, the Ditem provisions added to the tariff do not override other already effective tariff provisions that govern how, whether and pursuant to what standards changes can be made to the formula rate. The Joint Parties contend that the tariff already provides that WPSC cannot initiate a wholesale Ditem without a filing with the Commission under section 205 of the FPA.¹⁵ They further argue that nothing in the

¹⁴ Staff cites *Maine Yankee Atomic Power Co.*, 66 FERC ¶ 61,375 at 62,253 (1994).

¹⁵ See, *e.g.*, W-1A Tariff, Article B(15) entitled “Company Cost Deferrals and Recovery”: “[WPSC] has the additional right to bill the customer for the recovery of such additional deferred costs which must be the subject of future section 205 filings with FERC to be recoverable.”

Settlement or tariff restricts the Commission's right to determine whether a Ditem is just and reasonable, to initiate an investigation and to require a refund of all or part of the rate recovery of a Ditem. In fact, the Joint Parties state that the Settlement preserves customer rights to dispute Ditems by establishing that "[c]ustomers have the right to dispute before the FERC the justness and reasonableness of Ditems, both with respect to their amount and appropriateness for inclusion in rates."¹⁶ The Joint Parties contend that, in short, the Settlement Ditem provision maintains WPSC's obligation to make section 205 filings to incorporate new Ditems in its wholesale rates, implement the rate ceiling provisions of those rates, and allow customers to dispute (and the Commission to decide) the justness and reasonableness of those provisions.

Commission Determination

17. We find that the Ditem provisions in the Settlement and Offer are too broad, to the extent that they appear to apply to all deferred assets recorded in Account 182 and all deferred liabilities recorded in Account 254. Account 182 has three separate parts – Account 182.1, Extraordinary property losses; Account 182.2, Unrecovered plant and regulatory study costs; and Account 182.3, Other regulatory assets. Account 254 is identified generally as "Other regulatory liabilities." The proposed treatment of deferrals and amortizations provided for in the Settlement and Offer should apply to only the deferrals and amortizations that are being paid out in the instant case, *i.e.*, the NQDT allocation payment, the contingent and non-contingent loss payments, and the fuel and purchased power and operation and maintenance payments related to the 2005 Kewaunee Plant outage. These costs are specifically before the Commission in this case. Future treatment of any other type of wholesale Ditem is subject to Commission review, without deference to a state commission's treatment of any retail Ditem.

18. Indeed, the Joint Parties state that the Settlement is not intended to limit the Commission's authority over wholesale Ditems. WPSC concedes that it may not initiate a wholesale Ditem without a section 205 filing before the Commission. Therefore, we believe that clarifications to that effect should not cause the agreements' undoing. We will direct WPSC to modify relevant provisions of the Settlement and Offer to limit the treatment of deferrals and amortization provided for in those agreements to only the deferrals and amortizations of costs being paid out here.

Standard of Review

¹⁶ The Joint Parties cite Article B(15)(a)(iv) of the W-1A tariff.

Comments and Reply Comments

19. Staff's second concern pertains to section 10.9 of the Settlement and section 8.9 of the Offer, which address the standard of review applicable to modification of the agreements. The sections provide, in relevant part:

This [Settlement or Offer] is subject to initial review and modification by the Commission under the just and reasonable standard; subject to the right of any Party to withdraw from the [Settlement or Offer] and thereby render the [Settlement or Offer] null and void in the event the Commission modifies the [Settlement or Offer] in a manner that is unacceptable to such Party. However, within thirty days following Commission acceptance of the [Settlement or Offer], it will have been deemed substantially performed by the Parties . . . and therefore, after such performance the [Settlement or Offer] is subject to modification only by the agreement of and the consensual filing by the Parties.

20. Staff is concerned that neither the Settlement nor the Offer may be revised in any manner without the consent of all settling parties. Staff suggests that approval of the agreements as written would bar the Commission from ever revisiting and modifying their provisions.

21. The Joint Parties state that the Settlement (Article 10.9) has the effect of applying the public interest standard of review after the Commission has accepted the Settlement and the parties have undertaken performance of their respective obligations under the Settlement. While neither the Settlement nor the Offer expressly state that the public interest standard of review would govern attempts to modify the agreements after they take effect, the Joint Parties state that no particular language or magic words are necessary to invoke that standard.¹⁷

Commission Determination

22. Although the Settlement and Offer do not expressly provide for future review or modification by the Commission, no specific language is required to preserve the Commission's review authority.¹⁸ Where, as here, a contract provides that it is subject to change only by agreement of the parties, and it is otherwise silent as to the standard of

¹⁷ See *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (holding that no special verbal formulation is required to invoke the *Mobile-Sierra* standard, which thus applies when the parties clearly state an intent that the agreement should be modified only by the parties' mutual consent).

¹⁸ *Id.*

review applicable to future changes, the *Mobile-Sierra* doctrine applies.¹⁹ That doctrine holds that where parties have negotiated an agreement that denies either party the right to change it unilaterally, the Commission may abrogate or modify the contract, but only if the public interest so requires.²⁰ Accordingly, Article 10.9 of the Settlement and Article 8.9 of the Offer, as currently written, allow for future Commission review and modification under the public interest standard. The Joint Parties concede as much in their reply.²¹ Therefore, we will require no changes to those sections.

Miscellaneous

23. We note that refunds will be paid in accordance with the provisions in Articles II and III of the Settlement and Article II of the Offer. In addition, the tariff designations submitted with the Settlement and Offer do not comply with *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000). WPSC is required to file rate schedule sheets in conformance with Order No. 614 within 30 days of this order.

24. This order terminates Docket Nos. ER05-1089-001, AC05-54-001, EL05-136-001, and ER06-1027-000.

The Commission orders:

(A) The Settlement and Offer are hereby conditionally approved, subject to the modifications discussed in the body of this order.

(B) WPSC is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

¹⁹ See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956). Indeed, even had the contract been completely silent as to future changes, the public interest standard would have applied. See, e.g., *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) (“absent contractual language susceptible to the construction that the rate may be altered while the contract[] subsists, the *Mobile-Sierra* doctrine applies”).

²⁰ See *Texaco, Inc. v. FERC*, 148 F.3d at 1096 (citing *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)).

²¹ Joint Parties’ reply at p. 7.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part
with separate statements attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

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(Issued August 21, 2007)

KELLY, Commissioner, *dissenting in part*:

The parties to this settlement have requested that the Commission apply the *Mobile-Sierra* “public interest” standard of review to any future changes to the settlement agreement that may be proposed by a party, a non-party or the Commission acting *sua sponte*. As I explained in my separate statement in *Transcontinental Gas Pipe Line Corporation*,¹ in the absence of an affirmative showing by the parties and reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard of review to the extent future changes are sought by a non-party or the Commission acting *sua sponte*, I do not believe the Commission should approve such a provision.

Accordingly, I respectfully dissent in part from this order.

Suede G. Kelly

¹ 117 FERC ¶ 61,232 (2006).

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlements that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlements sought by a non-party or the Commission acting *sua sponte*.

For this reason, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).